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No. 85-735

In the Supreme Court of the United States

OCTOBER TERM, 1985

BORIPAT SIRIPAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the admission of the statements of co-conspirators violated the Sixth Amendment Confrontation Clause.

2. Whether these statements were properly admitted into evidence under Fed. R. Evid. 801(d)(2)(E).

3. Whether the evidence was sufficient to support petitioner's conviction.

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Constitution, statute and rule:

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reported at 771 F.2d 840.

JURISDICTION

The judgment of the court of appeals was entered on August 28, 1985. The petition for a writ of certiorari was filed on October 28, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, petitioner was convicted on one count of conspiring to distribute and to possess with intent to distribute heroin, in violation of 21 U.S.C. 846. Petitioner was sentenced to a term

of 15 years' imprisonment and fined $15,000. The court of appeals affirmed (Pet. App. 1-13).

1. The evidence at trial showed that petitioner and a number of co-conspirators were involved in a scheme in which heroin was transported from Thailand into the United States by means of a diplomatic pouch and then distributed. In March and April of 1982, Paul Primiano agreed to purchase a substantial quantity of heroin from Alexander Steubing, an American citizen, and Boonyarit Voravithaya, a Thai national traveling in the United States. Steubing and Voravithaya drove to Chicago, where Voravithaya obtained one and one-half pounds of heroin from Sihadej Chindawongse,[1] who was then serving as the Vice Consul of the Royal Consulate of Thailand in Chicago. On April 9, 1982, Steubing and Voravithaya were arrested in Baltimore, and a search of their luggage revealed a pound of 91% pure heroin and $54,670 in cash. Pet. App. 2.

Upon his arrest, Voravithaya gave a complete and full confession, and agreed to plead guilty to conspiracy to distribute heroin, in violation of 21 U.S.C. 846, and to cooperate as an undercover agent. In his undercover capacity, Voravithaya made a number of monitored, tape-recorded phone calls to Viroj Chitmongkollert (a/k/a Ang) and Pirom Chongcharoen (a/k/a Dang), his heroin suppliers and superiors in Thailand. He also made calls to Chindawongse in Chicago and to Primiano in New Jersey. Chitmongkollert and Chongcharoen told Voravithaya that he was to pay their messenger in New York City the $60,000 that he owed them, and that after the payment was made, he would be able to receive three pounds of heroin from Chindowongse in Chicago. This messenger was petitioner. Pet. App. 3.

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[1] Chindawongse was tried jointly with petitioner.

Pursuant to his instructions, Voravithaya telephoned petitioner on April 15, 1982, at Room 902 in the Sheraton City Squire Hotel in New York City and arranged to meet petitioner the following day. Hotel records indicate that, during his stay, petitioner telephoned the numbers in Thailand used by Chitmongkollert and Chongcharoen. Pet. App. 3.

On April 16, 1982, while under DEA surveillance, Voravithaya, carrying the $60,000 in cash, met with petitioner in the Sheraton. The two greeted each other in the lobby, had a drink at the hotel bar, and entered an elevator together. The elevator proceeded directly to the ninth floor. Shortly thereafter, Voravithaya returned to the lobby without petitioner or the cash. Pet. App. 3.

Voravithaya then proceeded to Chicago with DEA agents to receive the heroin made available as a result of the exchange with petitioner. On April 20, 1982, he received two pounds of 98% pure heroin from Chindawongse. The next day, after he placed another call to Chitmongkollert in Thailand, Voravithaya received another pound of heroin. Pet. App. 3.

On April 27, 1982, at Chicago's O'Hare Airport, Chindawongse picked up a diplomatic pouch addressed to the Royal Consulate of Thailand. Later that day, after taking the pouch back to the Thai consulate, Chindawongse was observed holding a distinctive bag outside the consulate's office. Three days later, Chindawongse was arrested in Chicago. A search of his house yielded four and a half pounds of 98% pure heroin, located in the distinctive bag observed on April 27. Pet. App. 3-4.

Meanwhile, on April 29, 1982, Chitmongkollert instructed Voravithaya to meet again with petitioner and to pay him $240,000, for which Voravithaya would receive four and one-half pounds of heroin from

Chindawongse in Chicago. Chitmongkollert gave Voravithaya a phone number in California at which to contact petitioner. On May 2, 1982, DEA agents surveilled the address for which this phone number was listed and arrested petitioner walking out of that house. At the time of the arrest, a search of the house uncovered an address book containing the phone numbers in Thailand of Chitmongkollert and Chongcharoen; used plane tickets confirming petitioner's presence in New York on the day that Chitmongkollert had instructed Voravithaya that the messenger would be dispatched to receive the $60,000; another used plane ticket confirming petitioner's travel from Thailand to California on April 30, 1982, the day Chitmongkollert had advised Voravithaya that the messenger would arrive in California; and a message in Thai, which translated as "friend from Muangthong Housing Estate has gone to inquire about the [stuff, article, or thing] intrusted from Huahin."[2] One week later, Voravithaya died from an apparent suicide. Pet. App. 4.

2. At trial, the consensually monitored phone conversations between Voravithaya and various coconpirators, including petitioner, Chindawongse, Chitmongkollert, and Chongcharoen, were introduced into evidence. None of the parties to the conversations was available to testify—Chindawongse, because of the exercise of his Fifth Amendment right not to testify; Chitmongkollert and Chongcharoen, because they were in Thailand; and Voravithaya, because he was dead. Pet. App. 8 n.6. The conversations were admitted under Fed. R. Evid. 801(d)(2)(E) as co-

[2] This message, consistent with other coded writings in the conspiracy, used geographic locations in Thailand to identify members of the conspiracy, and instructed petitioner to receive a package from one individual in trust for another (Pet. App. 4 n.2).

conspirator statements made during the course of and in furtherance of a conspiracy. The government produced the requisite independent evidence of petitioner's participation in the conspiracy, and the trial court made an implicit finding of the existence of a conspiracy and petitioner's participation in it.

The court of appeals affirmed the conviction, finding that there was ample independent evidence of the existence of the conspiracy and of petitioner's participation in it to justify the admission of the tapes (Pet. App. 5-7). The court further held that since the tapes had been properly admitted under Fed. R. Evid. 801(d)(2)(E), their admission did not violate the Confrontation Clause (Pet. App. 7-10).

ARGUMENT

1. Petitioner contends (Pet. 7-10) that admission of the tapes under the co-conspirator exception to the hearsay rule, Fed. R. Evid. 801(d)(2)(E), violated the Confrontation Clause as construed in *Ohio* v. *Roberts*, 448 U.S. 56 (1980). This argument lacks merit.

In *Ohio* v. *Roberts*, the Court rejected a Confrontation Clause challenge to the admission of testimony given at a preliminary hearing. The Court stated (448 U.S. at 65) that "[t]he Confrontation Clause operates in two separate ways to restrict the range of admissible hearsay." First, the Court stated (*ibid.*), the prosecution must sometimes demonstrate that the declarant is unavailable as a witness, and second (*id.* at 65-66), the evidence must be reliable. The Court added that "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." *Id.* at 66.

Here, petitioner concedes (see Pet. 7) that all of the co-conspirator/declarants were unavailable to

testify at trial.[3] Moreover, the statements in question were sufficiently reliable to satisfy the Confrontation Clause. The statements fell within the co-conspirator rule, a "firmly rooted" exception to the hearsay rule that grew up 200 years ago. See U.S. Br. at 19-21 in *United States* v. *Inadi*, No. 84-1580. Accordingly, the reliability of these statements can be "inferred without more." *Ohio* v. *Roberts*, 448 U.S. at 66. See also, *e.g.*, Pet. App. 8-10; *United States* v. *Lurz*, 666 F.2d 69, 80-81 (4th Cir. 1981), cert. denied, 455 U.S. 1005 (1982) and 457 U.S. 1136 (1982); *United States* v. *Kendall*, 665 F.2d 126, 133 (7th Cir. 1981), cert. denied, 455 U.S. 1021 (1982); *United States* v. *Peacock*, 654 F.2d 339 (5th Cir. 1981), cert. denied, 464 U.S. 965 (1983); *United States* v. *Burroughs*, 650 F.2d 595 (5th Cir.), cert. denied, 454 U.S. 1037 (1981); *United States* v. *Papia*, 560 F.2d 827, 835 (7th Cir. 1977); *Ottomano* v. *United States*, 468 F.2d 269, 273 (1st Cir. 1972), cert. denied, 409 U.S. 1128 (1973). Neither *Roberts* nor any other decision of this Court conditions the admission of co-conspirator statements upon a showing that the statements are reliable for reasons in addition to the fact that they fall within Fed. R. Evid. 801(d)(2)(E).

It is true, as petitioner notes (Pet. 11-14), that some courts of appeals have required a separate, individualized inquiry into whether co-conspirator statements are sufficiently reliable for Confrontation Clause purposes. See, *e.g.*, *United States* v. *Ordonez*, 737 F.2d 793, 802-804 (9th Cir. 1984); *United States*

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[3] For this reason, there is no need to hold this petition pending the decision in *United States* v. *Inadi*, No. 84-1580 (argued Dec. 3, 1985), which concerns the question whether the government may introduce co-conspirator statements without producing the declarant or showing that he is unavailable.

v. *Ammar*, 714 F.2d 238, 254-257 (3d Cir.), cert. denied, 464 U.S. 936 (1983); *United States* v. *Wright*, 588 F.2d 31, 37-38 (2d Cir. 1978), cert. denied, 440 U.S. 917 (1979); *United States* v. *Kelley*, 526 F.2d 615, 620-621 (8th Cir. 1975), cert. denied, 424 U.S. 971 (1976). The statements at issue here clearly pass this test as well.

Even those courts that do not regard co-conspirator statements as automatically reliable for Confrontation Clause purposes, acknowledge that "'[i]n most cases the determination that a declaration is in furtherance of the conspiracy * * * will decide whether sufficient indicia of reliability were present. While there may be exceptions, we do not think that they will be frequent.'" *United States* v. *Wright*, 588 F.2d at 38, quoting *United States* v. *Puco*, 476 F.2d 1099, 1107-1108 (2d Cir.), cert. denied, 414 U.S. 844 (1973); *United States* v. *Ammar*, 714 F.2d at 256; *United States* v. *Nelson*, 603 F.2d 42, 46 (8th Cir. 1979). In assessing reliability, these courts generally examine four factors derived from *Dutton* v. *Evans*, 400 U.S. 74, 88-89 (1970) (plurality opinion). They are (*United States* v. *Ammar*, 714 F.2d at 256, quoting *United States* v. *Perez*, 658 F.2d 654, 661 (9th Cir. 1981)):

> (1) Whether the declaration contained assertions of past fact; (2) whether the declarant had personal knowledge of the identity and role of the participants in the crime; (3) whether it was possible that the declarant was relying upon faulty recollection; and (4) whether the circumstances under which the statements were made provided reason to believe that the declarant had misrepresented the defendant's involvement in the crime.

The statements in the instant case were clearly reliable under this analysis. In particular, the conversa-

tions relating to petitioner concerned ongoing and future transactions, specifically the arrangements for the payments of cash for heroin. In view of the fact that petitioner was Chitmongkollert's messenger, Chitmongkollert as declarant clearly had knowledge of petitioner's identity and role in the activities. There is no reason to believe that Chitmongkollert was relying on faulty recollection; he was simply describing the current arrangement for the exchange. Moreover, the only factor challenged by petitioner is whether any reason existed for Chitmongkollert to misrepresent petitioner's role in the conspiracy. Surely, however, every incentive existed to speak accurately, since Chitmongkollert was giving instructions for the exchange of the money and describing his messenger who was to receive this money. In these circumstances, it is evident that, even if they must be tested individually, the statements were sufficiently trustworthy to be admitted under the Confrontation Clause.[4]

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[4] The Sixth Amendment right of confrontation applies with respect to the "witnesses against" the defendant. *Roberts* and *Dutton* appear to assume, without actual analysis of the issue, that any nontestifying hearsay declarant is a "witness" within the meaning of the Confrontation Clause. In our view, however, this is an issue that requires closer scrutiny than it has heretofore received. Such scrutiny would, we believe, demonstrate that the term "witness" should not be defined so broadly that it includes every maker of an entry in a business record, every patient who describes his ailment to a physician, or every agent who makes a statement designed to further a business venture. Rather, it should include persons who actually give testimony in court and, in addition, only those extra-judicial declarants whose statements are testimonial in character—*i.e.*, made or obtained for use in a judicial or administrative proceeding. While the precise dimensions of the definition of witness require some further delineation, it would seem quite clear that a co-conspirator who

2. Petitioner also contends (Pet. 15-17) that the necessary predicates under Fed. R. Evid. 801(d)(2)(E) for admission of the tapes were not met. He contends that there was no independent evidence that either he or the parties to the conversations were members of the conspiracy.

The court of appeals correctly found that there was sufficient independent evidence of petitioner's role in the conspiracy (Pet. App. 5-7), and that factual conclusion does not warrant this Court's review. The government established that on April 16, 1982, petitioner met with Voravithaya in the lobby of the Sheraton City Squire Hotel in New York. They had a drink together in the hotel bar and then rode the elevator to the ninth floor. Petitioner had a room on the ninth floor, room 902. Voravithaya was carrying $60,000 when he entered the elevator. He did not have the money when he returned to the hotel lobby several minutes later. In addition, telephone records at the hotel and at the house where petitioner lived in California reflected calls to the numbers in Thailand used by Chitmongkollert and Chongchareon, the drug suppliers for the conspiracy. A search of petitioner's house also uncovered (1) used airplane tickets confirming petitioner's presence in New York at the time of Voravithaya's $60,000 payoff, (2) a used airplane ticket indicating petitioner's travel from Thailand to California on the very day Chitmongkollert had advised Voravithaya that the messenger would arrive in California, and (3) a coded

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speaks during the course of a conspiracy for the purpose of furthering its objectives is not being a "witness."

For the reasons given in text, however, petitioner's Confrontation Clause claim must be rejected even if co-conspirator declarants are considered to be "witnesses" whose "evidence" is regulated by the Clause.

Thai message meaning that petitioner was to receive a package from one individual in trust for another. As the court of appeals found (Pet. App. 6-7), these pieces of evidence, taken together with all the inferences that logically may be drawn therefrom, reasonably support a conclusion that petitioner was a participant in the conspiracy.

In addition, the non-hearsay sections of the tapes themselves may be used to establish the requisite independent evidence. The instructions and other non-assertive statements on the tapes are not hearsay and need not even meet the co-conspirator exception to be admissible. See *United States* v. *Shepherd*, 739 F.2d 510, 514 (10th Cir. 1984); *United States* v. *Keane*, 522 F.2d 534, 558 (7th Cir. 1975), cert. denied, 424 U.S. 976 (1976). These in turn provide circumstantial evidence that petitioner was a co-conspirator. See *United States* v. *Helmel*, 769 F.2d 1306, 1313-1314 (8th Cir. 1985).

This same principle establishes Chitmongkollert's participation as a member of the conspiracy. The fact that the statements were made is circumstantial evidence of Chitmongkollert's knowledge and of the fact that he was a co-conspirator. When considered for this purpose, *i.e.*, for the fact that the statements were made, the statements are not considered for their truth, but as verbal acts to show involvement, and thus are not hearsay. See *United States* v. *Helmel*, 769 F.2d at 1313-1314; *United States* v. *Shepherd*, 739 F.2d at 514; *United States* v. *Brooklier*, 685 F.2d 1208, 1219 (9th Cir. 1982), cert. denied, 459 U.S. 1206 (1983). In addition, the statements by Chitmongkollert may also be used to establish his knowledge without constituting hearsay. Thus the conversations, together with the existence of Chitmongkollert's name and telephone number in

petitioner's address book, are clearly sufficient to establish, by a preponderance of the evidence, that Chitmongkollert was a member of the conspiracy.

As to Voravithaya's statements in the tapes, while he was not then a conspirator, the vast majority of his remarks were insignificant and nonassertive comments such as questions and agreement to instructions. While the statements were useful to allow the tapes to be comprehensible, Voravithaya's statements by themselves had very little implicating value. The few statements that might qualify as assertions were adopted by Chitmongkollert, as is made clear by the context of the conversation. See, *e.g.*, Pet. App. 102. Statements made by an informant and subsequently adopted by a co-conspirator are specifically admissible under Rule 801(d)(2)(E). See *United States* v. *Ammar*, 714 F.2d at 251-253. In any event, Voravithaya did not have any independent information implicating petitioner in the conspiracy, and therefore such declarations as implicated petitioner could only have been those of Chitmongkollert, who was a co-conspirator.

3. Petitioner's final contention (Pet. 18-21) is that the evidence against him is insufficient for conviction. This fact-bound question is not worthy of further review by this Court. As the court of appeals correctly observed (Pet. App. 10-11), the facts that provide independent evidence of petitioner's participation in the conspiracy, taken together with the taped conversations, clearly establish petitioner's role in the conspiracy, as well as his knowledge.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1985

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